

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---

CHRISTOPHER HART, et al,

Plaintiffs,

-vs-

13-CV-6458

CRAB ADDISON, INC.,  
d/b/a JOE'S CRAB SHACK, et al,

Defendants.

---

Proceedings held before the  
Honorable Marian W. Payson, Kenneth B.  
Keating Courthouse, 100 State Street,  
Rochester, New York, on October 19,  
2017.

APPEARANCES:

JESSICA L. LUKASIEWICZ, ESQ.,  
Appearing for Plaintiffs.

BRIAN JEFFREY GERSHENGORN, ESQ.,  
MELISSA JILL OSIPOFF, ESQ.,  
Appearing for Defendants.

AUDIO RECORDER: Kathy J. Allen

TRANSCRIBER: Michelle L. McLaughlin, RPR,  
Court Reporter,  
716/332-3560

(Proceedings recorded by electronic sound  
recording, transcript produced by computer.)

1 THE COURT: Good afternoon. Please be  
2 seated.

3 THE CLERK: Christopher Hart, et al,  
4 versus Crab Addison, 15-CV-6458.

5 THE COURT: Would counsel like to note  
6 their appearances for the record, please?

7 MS. LUKASIEWICZ: Good morning, your  
8 Honor. Jessica Lukasiewicz from Thomas and Solomon  
9 for the plaintiffs.

10 THE COURT: Good afternoon.

11 MR. GERSHENGORN: Good afternoon, your  
12 Honor. Brian Gershengorn, Melissa Ossipoff from  
13 Fisher Phillips for defendants.

14 THE COURT: Okay. Good afternoon. Who's  
15 going to be arguing today?

16 You are, Mr. Gershengorn?

17 MR. GERSHENGORN: Yes, your Honor.

18 THE COURT: Okay. In the event that you  
19 do not get the relief that you're looking for here  
20 and that you have to make another trip to Rochester  
21 at some point on this case, I encourage you to take  
22 a look at a new policy that's been adopted by  
23 couple of judges in our court after New York State  
24 report -- you may have seen it -- about women  
25 litigators and opportunities afforded to women in

1 the courtroom. And at this point a couple of  
2 judges -- maybe it will be more over the next  
3 several months -- have adopted a policy. I think  
4 it's framed as a junior lawyer policy to encourage  
5 junior lawyers, not just women junior lawyers, but  
6 junior lawyers to have more opportunities in court.  
7 One of the things that the policy acknowledges is  
8 that -- or at least implicitly acknowledges is it's  
9 sometimes hard to get a client to agree to that,  
10 and so the -- if one wishes to proceed that way,  
11 we're open to supplementing the record, you know,  
12 after the oral argument, you know, by the more  
13 senior attorney, if that's something that counsel  
14 is interested in doing. So take a look at that.

15 I'm assuming that Miss Osipoff is more junior  
16 than you, Mr. Gershengorn. I think that's true. I  
17 don't know that definitively, and certainly we've  
18 had an awful lot of litigation surrounding an  
19 issue, and I expected to hear from Miss Osipoff on  
20 the witness stand, but I'm not sure that I've heard  
21 Miss Osipoff as counsel on any motions. At least I  
22 can't remember that. So, just encourage you to  
23 think about that opportunity in the future if you  
24 have to come back here. Okay.

25 MR. GERSHENGORN: Thank you.

1           THE COURT: All right. So, with respect  
2 to the procedural posture of the case, since  
3 everybody was in court last on this matter what has  
4 happened is that the corporate defendants have  
5 filed for bankruptcy protection under Chapter 11.  
6 I think that's pending somewhere in Texas, if I'm  
7 not mistaken. And the plaintiffs here, in addition  
8 to having sued those corporate defendants, has also  
9 sued three individual defendants. Mr. Gershengorn  
10 and Miss Osipoff and their firm is counsel -- to  
11 date is counsel both for the corporate defendants  
12 and for the individual defendants.

13           This Court acknowledges and recognizes that the  
14 automatic bankruptcy stay is in effect with respect  
15 to any further proceedings pertaining to the  
16 corporate defendants. That automatic stay does not  
17 by its terms extend to the individual defendants.

18           Since the filing of the bankruptcy petition,  
19 the firm of Fisher Phillips has moved this Court  
20 for permission to withdraw as counsel for the  
21 individual defendants. They have done that as our  
22 local rules permit by submitting to me an affidavit  
23 and memo of law in camera, which I have considered.  
24 The plaintiffs oppose that application, and do so  
25 on certain assumptions that they make because they

1 don't have access to what the in camera filings  
2 were. So they're -- they're making certain  
3 assumptions which may or may not be correct. And a  
4 reply letter was submitted -- and was that in  
5 camera as well, the reply letter?

6 MR. GERSHENGORN: We submitted part of  
7 it --

8 THE COURT: That's right. I did take a  
9 look at that. Okay. So, I have a lot of  
10 questions. Quite a number of them are factual  
11 questions. You're welcome to stay at the table if  
12 you like. You've got a big notebook there. I  
13 don't know whether I'm going to be asking any  
14 questions about anything that you need to look at  
15 in the notebook. Whatever you're comfortable doing  
16 is fine.

17 MR. GERSHENGORN: I'm fine at counsel  
18 table.

19 THE COURT: Okay.

20 MR. GERSHENGORN: If that's okay.

21 THE COURT: So just pull the base of the  
22 microphone, and you can sit if you like or stand,  
23 as you wish.

24 MR. GERSHENGORN: Thank you.

25 THE COURT: All right. So, let me ask

1 just a couple updating questions first. The three  
2 individual defendants -- and just again so -- so  
3 we're clear on this, at this stage you are still  
4 counsel to them, because you would have to get  
5 permission from the Court to withdraw, and that  
6 hasn't been granted. So to the extent that your  
7 papers may include some kind of disclaimer that the  
8 papers are being submitted on their behalf, that's  
9 not permitted and you are counsel for those  
10 individual defendants.

11 But tell me what is their position with respect  
12 to this application, and what -- what's the status  
13 of their retaining new counsel to represent them?

14 MR. GERSHENGORN: Thank you, your Honor.  
15 I guess the latter part of your question first, it  
16 was news to us when we saw in plaintiffs' counsel's  
17 opposition that the three individual defendants  
18 were represented by Seyfarth Shaw. We had not  
19 known that to be true. We have since learned that  
20 is not true. So as far as we've been told, they  
21 have not retained new counsel, Seyfarth or anybody  
22 else to our knowledge, your Honor.

23 THE COURT: Okay. So, they're aware of  
24 your application?

25 MR. GERSHENGORN: They're aware of our

1 application. Pursuant to the rule and your Honor's  
2 directive, we have provided them with  
3 documentation.

4 THE COURT: What is their position on it?

5 MR. GERSHENGORN: They have no position  
6 that we're aware of, your Honor.

7 THE COURT: All right. I mean, have  
8 you -- have you talked to them about whether their  
9 view is that they would like you to continue  
10 representing them, whether they would like to be  
11 represented by other counsel?

12 MR. GERSHENGORN: I guess without  
13 divulging any attorney-client communication, there  
14 has been no substantive dialogue.

15 THE COURT: Okay. So, I'm going to assume  
16 from that that the individual defendants -- that  
17 we're not in a situation where, you know, if they  
18 were here, they'd say we join in the application,  
19 and we have counsel so and so is ready to take on  
20 the representation.

21 MR. GERSHENGORN: That's certainly  
22 correct.

23 THE COURT: Okay. Now -- all right.  
24 Let's switch to another question. What is  
25 happening in the bankruptcy matter? I couldn't

1 actually find any docket sheet that pertained to  
2 that bankruptcy. I'm not sure why I couldn't find  
3 that, but I -- I searched for it by Ignite  
4 Restaurant and Crab Addison and certain things, and  
5 I came up with a lot of cases, but I didn't come up  
6 with a bankruptcy case.

7 MR. GERSHENGORN: Well, I'm happy to  
8 provide the Court. I think we have -- we've seen a  
9 copy of the docket, your Honor. We can provide  
10 that if the Court wanted. As best as I recall, I  
11 believe the -- the date for the bankruptcy, I'll  
12 call it closing, wrap up, finality is for late  
13 November. I think November 27th. Around  
14 November 27th, your Honor.

15 THE COURT: Okay.

16 MR. GERSHENGORN: And so I think it's  
17 winding its way through bankruptcy court as a case  
18 normally would.

19 THE COURT: And what is the status with  
20 respect to -- or what attention has been given by  
21 the bankruptcy proceeding to this particular  
22 litigation?

23 MR. GERSHENGORN: So, I'm not privy to  
24 those conversations. I do know that conversations  
25 have or are taking place with plaintiffs' counsel.



1 I think they might be able to shed more light on  
2 the details --

3 THE COURT: Okay.

4 MR. GERSHENGORN: -- of those  
5 conversations.

6 THE COURT: Okay.

7 MR. GERSHENGORN: My only understanding,  
8 your Honor, is that there is a dialogue.

9 THE COURT: Okay. Presumably the  
10 plaintiffs have claims in that bankruptcy  
11 proceeding.

12 MR. GERSHENGORN: That's my understanding.

13 THE COURT: Okay. I do want that  
14 information. Let me just ask one more question to  
15 Mr. Gershengorn. All right.

16 Now, with respect to the individual defendants  
17 and the question of indemnification, what -- what  
18 have they done to identify themselves in the  
19 bankruptcy proceedings as parties that may someday  
20 have an indemnification claim against the bankrupt  
21 company?

22 MR. GERSHENGORN: So, your Honor, I  
23 believe as part of the bankruptcy filings -- it's a  
24 matter of public record -- they have each  
25 individually filed claims in the bankruptcy case on

1       those -- well, on the basis of indemnification.

2               THE COURT:   Okay.   And is there some  
3       documentation that shows that?

4               MR. GERSHENGORN:   Yes, there is, your  
5       Honor.

6               THE COURT:   Okay.   And if I could just  
7       take a look at that?

8               MR. GERSHENGORN:   Yeah.   Can I approach?

9               THE COURT:   Yes, please.

10              MR. GERSHENGORN:   It's rather thick, but I  
11       think it's because the complaint -- it's really the  
12       first couple pages.

13              THE COURT:   Okay.   Thanks.

14              MR. GERSHENGORN:   Those are for all three  
15       of them.

16              THE COURT:   Um-hum.   Okay.   So I've been  
17       handed a proof of claim -- copy of a proof of claim  
18       form.   I'm not going to go through all of them.   I  
19       assume they're similar, if not identical.   The one  
20       as to Mr. Morris appears to have been executed on  
21       September 1st.   In answer to the question how much  
22       is the claim, the answer is contingent and  
23       unliquidated based on indemnity.   Similar language  
24       is probably in the other ones.

25              Okay.   Do you represent any parties in the

1 bankruptcy?

2 MR. GERSHENGORN: No, we do not, your  
3 Honor.

4 THE COURT: Okay. Is your firm a creditor  
5 in the bankruptcy?

6 MR. GERSHENGORN: We are, your Honor.

7 THE COURT: Are you identified as a  
8 creditor?

9 MR. GERSHENGORN: Yes, we are.

10 THE COURT: Have you made a claim?

11 MR. GERSHENGORN: We have.

12 THE COURT: Okay. Okay.

13 Miss Lukasiewicz, why don't you tell me what  
14 you know. And you just pull the microphone over to  
15 you as well and you can remain seated. What's  
16 going on as far as this litigation in the  
17 bankruptcy as it pertains to the corporate  
18 defendants?

19 MS. LUKASIEWICZ: First I would just say  
20 sorry, I was reached out by an attorney on three  
21 different occasions from Seyfarth indicating that  
22 they were now -- he was now retained for the  
23 individuals, so that was the point.

24 THE COURT: Okay. And your last  
25 communication with that attorney was when?

1 MS. LUKASIEWICZ: Say approximately three  
2 weeks ago via email, but I could be off on that  
3 exact date. Somewhere around then.

4 THE COURT: Okay.

5 MS. LUKASIEWICZ: But in terms of this  
6 action as it relates to the bankruptcy proceedings,  
7 we have filed a class proof of claim as well as  
8 individuals from this action. I believe for  
9 approximately 300-plus have filed individual proofs  
10 of claims as well. We also, as our law firm, have  
11 filed a proof of claim. And so that is all going  
12 through. There's -- the hearing for the class  
13 proof of claim was actually supposed to be tomorrow  
14 but got postponed. I think it's supposed to be  
15 scheduled in November right now. So that's where  
16 we are in terms of the process.

17 THE COURT: Okay. So, nothing -- nothing  
18 more concrete than that at this stage?

19 MS. LUKASIEWICZ: Nothing more concrete  
20 than that, your Honor.

21 THE COURT: Okay. Who is the attorney  
22 from Seyfarth Shaw who you've been in touch with?  
23 Or do you not have that?

24 MS. LUKASIEWICZ: It's an individual from  
25 Illinois, from Chicago, and it's a gentleman. I

1 don't remember his name offhand.

2 THE COURT: But you have some notes  
3 somewhere?

4 MS. LUKASIEWICZ: Yes, I do.

5 THE COURT: Okay. All right. Okay. I  
6 have reached out to counsel for defendants to  
7 obtain copies of some documents which were  
8 referenced in their papers. I don't think this  
9 is -- I don't think should be any big secret is  
10 that these issues relate to issues of  
11 indemnification. And I asked for copies of the  
12 engagement letters that the individual defendants  
13 had signed. I was provided those engagement  
14 letters. They are with prior counsel, Epstein --

15 MR. GERSHENGORN: Becker and Green.

16 THE COURT: Becker. I'm assuming that  
17 either -- that there are no engagement letters  
18 either for Ogletree or for Fisher Phillips, is that  
19 right?

20 MR. GERSHENGORN: That's correct, your  
21 Honor.

22 THE COURT: Okay. All right. And I asked  
23 for copies of indemnification agreements. I did  
24 want to ask about that. I got an indemnification  
25 agreement for two of the individual defendants, but

1 not for Morris. And I don't know if that was an  
2 oversight. Is there -- is there an indemnification  
3 agreement for Mr. Morris?

4 MR. GERSHENGORN: We have not gotten one,  
5 your Honor. That was simply all we had.

6 THE COURT: Okay. And your -- I assume by  
7 your hesitation that you don't feel comfortable  
8 making a representation as to whether one exists or  
9 doesn't exist?

10 MR. GERSHENGORN: We had asked the  
11 follow-up. I haven't gotten a concrete answer to  
12 that question. But we did ask for all three, your  
13 Honor, and we provided the Court with what we got.

14 THE COURT: I'm assuming -- and tell me if  
15 my assumption is wrong, I'm assuming that there's a  
16 DNO policy?

17 MR. GERSHENGORN: I assume that to be  
18 correct as well, your Honor. I don't know, if that  
19 is true, what that policy looks like. We have not  
20 been privy to it.

21 THE COURT: You know, I've read at least  
22 one case where the issue of policy limits on a DNO  
23 policy were relevant to issues that, in my view,  
24 are properly before the Court now. I mean, that is  
25 are the policy limits of the DNO policy sufficient

1       that any indemnification claim would be taken care  
2       of under the policy? I mean, those -- that's a  
3       consideration that I think has relevance here. You  
4       don't -- you don't have any information as to the  
5       terms of any DNO policy or the coverage limits?

6               MR. GERSHENGORN: I don't, your Honor.  
7       The only -- the only conversation we had around if  
8       there was a DNO was that it would not be  
9       applicable. I have not seen it. I can't talk to  
10      it specifically.

11             THE COURT: Why wouldn't it be applicable?

12             MR. GERSHENGORN: I don't know.

13             THE COURT: Okay. I mean, that seems  
14      strange to me. Okay. So, let's talk about the --  
15      your claimed conflict here. You told me in pretty  
16      short motion papers that the claimed conflict is  
17      between the debtor defendant, the company and the  
18      individual defendants, quote, as a result of the  
19      debtor defendants filing for bankruptcy. So help  
20      me understand why is that a conflict? How is it a  
21      conflict? Is it a conflict that exists now? How  
22      would that conflict affect your ability to  
23      represent both sets of defendants consistent with  
24      your ethical obligations?

25             MR. GERSHENGORN: The conflict, your

1 Honor, as we see it, is one under 1.6 and 1.7 of  
2 the Professional Responsibility Rules where we're  
3 required to raise the issue with the Court. It's  
4 based on the proof of claims. The individual  
5 defendants are ostensibly making a claim for  
6 indemnification. The debtor defendants were taking  
7 a different position. Those are not two positions  
8 that could be --

9 THE COURT: How are they taking a  
10 different position? I mean, the debtor defendants,  
11 as I understand it, to date at least have paid the  
12 attorneys' fees on behalf of the individual  
13 defendants. Right? I mean to --

14 MR. GERSHENGORN: To the extent.

15 THE COURT: I mean, to the extent that  
16 they've paid attorneys' fees. They haven't said,  
17 you know, we're disclaiming and we're not going to  
18 pay their attorneys' fees.

19 MR. GERSHENGORN: That's correct.

20 THE COURT: Okay. So how does in this  
21 litigation -- you don't represent anybody in the  
22 bankruptcy. But in this litigation how does a --  
23 give me a scenario under which you would have  
24 divided loyalties as a result of a -- I don't know  
25 if the right word is inchoate claim. They have



1       documented their claim for indemnification, but  
2       that claim is no different -- it's not a different  
3       fact than existed when you represented both the  
4       bankrupt company and the individual defendants, you  
5       know, whenever you got into the case. They've  
6       always had a claim for indemnification. So what's  
7       different?

8               MR. GERSHENGORN: Well, they've asserted  
9       the claim now vis-a-vis the bankruptcy filing, and  
10      as we currently sit here --

11             THE COURT: But, I mean, they asserted  
12      their claim to some degree by requesting the  
13      company to pay their attorneys' fees all along.  
14      So, I mean, they've been relying on those  
15      provisions for indemnification of, you know -- I  
16      recognize there are -- there's the payment of  
17      attorneys' fees and the payment of any judgment if  
18      it could conceivably be entered. But they're  
19      acting under that -- that indemnification agreement  
20      and have been since the beginning of the case by  
21      asking the company to pay their attorneys' fees,  
22      right?

23             MR. GERSHENGORN: Yes, but now the  
24      company's not, and the company can no longer  
25      continue to pay the fees. So --

1           THE COURT:    So what does that do to you  
2   here?   Okay.   So they're going to duke that out in  
3   the bankruptcy proceeding.   It seems to me that it  
4   is in every bit as much in the company's interest  
5   now as it always has been that the individual  
6   defendants vigorously defend against these claims.  
7   How do they have divergent interests here?

8           MR. GERSHENGORN:   The -- the diversion  
9   interest is that they have a different take, your  
10   Honor, on if there is ever to be liability  
11   potentially in this matter, where that liability  
12   holds.   And so the -- and that's an issue that  
13   could have arose at any particular point in time in  
14   the litigation.   It seems to be an issue now in  
15   light of the debtor defendants being in bankruptcy.  
16   But --

17          THE COURT:    You haven't come to me and  
18   said something has arisen factually or we've  
19   developed information that causes us to believe  
20   that we have a conflict, in which case the company  
21   would still have the same obligations if ultimately  
22   it were determined that the defendant should be  
23   indemnified, but maybe they would be represented by  
24   new counsel.   But I think the company would still  
25   be required to pay new counsel fees apart from

1 the -- from the bankruptcy issue. But that -- I  
2 mean, that isn't what you've said.

3 You've said, it seems to me very clearly and  
4 starkly in your papers, the conflict is because  
5 there is a claim for indemnification in the  
6 bankruptcy proceeding. And you cited a case which  
7 is factually quite different from this case, and  
8 I'll get to that in a minute. And, you know,  
9 frankly, my view was okay, this situation arises  
10 all the time. Your position that, you know, once  
11 there is a bankruptcy and possibly a claim for  
12 indemnification by individual defendants against a  
13 bankrupt company, that is an actual conflict that  
14 mandates withdrawal under the professional rules.

15 You know, my -- my reaction was, number one,  
16 somewhat surprised, because I didn't necessarily  
17 see that, but then secondly, okay, I'm going to go  
18 to the cases and I'm going to find many examples  
19 where courts have acknowledged such a conflict and  
20 have permitted withdrawal of counsel. And I think  
21 that I said to you in an earlier telephone  
22 conference -- said to whoever was participating in  
23 that conference that I thought the issue was going  
24 to be an issue of a stay, whether there should be a  
25 stay on behalf of the individual defendants. And

1       that individual defendants' counsel would probably  
2       seek a stay, and the plaintiffs would probably not  
3       seek a stay, and that's what we would be arguing  
4       about. And that seemed to me what we should be  
5       arguing about.

6           And so, you know, I certainly read the one  
7       case, Mr. Gershengorn, that you cited. And, you  
8       know, it's -- it's legally different because it  
9       arises in the context of a bankruptcy where the  
10      lawyer was the lawyer for the bankrupt company, and  
11      there is a rule under the bankruptcy law that the  
12      lawyer has to be disinterested. So, it was a  
13      question of what that means under the bankruptcy  
14      code. But I think, you know, apart -- so I would  
15      say that it's -- you know, it is a different  
16      legal -- legal question and factual scenario,  
17      because the Fisher Phillips firm isn't representing  
18      anybody in the bankruptcy. But more importantly,  
19      the case -- the facts were -- were very different,  
20      at least as I understand the facts are here.

21           In that case the individual defendant had  
22      agreed to contribute a certain sum of money to the  
23      debtor company in the bankruptcy proceeding. And  
24      then -- and there had been litigation that had gone  
25      on for some period of time before that. And then

1 the court says -- and this is page 675 of TWI  
2 International versus Vanguard Oil and Service  
3 Company, 162 Bankruptcy Reporter, and it's -- 162  
4 Bankruptcy Reporter, and at 672, Southern District  
5 of New York, 1994. And on page 675 the court notes  
6 thereafter Butler agreed to contribute a certain  
7 sum of money to Vanguard in bankruptcy proceeding.  
8 After the time that Butler agreed to make this  
9 contribution, Mr. Simpson's representation of him  
10 in any action would have been and would be  
11 inappropriate. Specifically, Mr. Simpson's  
12 representation of Butler could put him in a stance  
13 of advocating a position that would decrease the  
14 value of the bankruptcy estate. For example, if  
15 Mr. Simpson were to negotiate a settlement in the  
16 instant case -- which would be analogous to this  
17 case -- in which his client agreed to make payments  
18 to TWI -- the bankrupt company -- Butler possibly  
19 would be unable to make his contribution to the  
20 bankruptcy estate. In such a case, Mr. Simpson  
21 would be asserting a, quote, economic interest that  
22 would lessen the value of the bankruptcy estate,  
23 and thus, would not be disinterested -- again, as  
24 defined in the bankruptcy code. In sum, the court  
25 concludes that there is a, quote, potential actual

1 conflict if Mr. Simpson were to represent Butler in  
2 this action.

3 And that's the one case that is cited by  
4 defendants in support of their application for  
5 permission to withdraw. I -- that case, seems to  
6 me, a far cry from support for the basic  
7 proposition that when you have a corporate  
8 defendant and you have individual defendants who  
9 are officers or employees of that corporation, and  
10 they're all in litigation together and they're all  
11 represented by the same lawyer, if the company  
12 files for bankruptcy and there is an issue of  
13 possible indemnification, that counsel has to get  
14 out of the case.

15 And, you know, to -- there could be a lot of  
16 lawyers who are wrong, but my question -- I wanted  
17 to know if I deny the motion for counsel and the  
18 issue of a stay is litigated, what is the law on  
19 that -- on that issue? And, you know, there are a  
20 lot of cases out there that are -- that are very  
21 helpful. I think parsing them I can draw some --  
22 you know, some conclusions, and there are generally  
23 some -- some rules that the Court acknowledges,  
24 although I will say that, you know, they -- some  
25 courts come out one way and some courts come out

1 another way.

2 But what was interesting to me was the number  
3 of these cases. And I went back and I said okay,  
4 if it's so basic, I'm going to see that in the  
5 docket sheet. And I went case-by-case, and the  
6 majority of those cases in which the individual  
7 defendant, the question of whether a stay, the  
8 bankruptcy stay, should be extended to the  
9 individual defendants, either by the bankruptcy law  
10 or as a discretionary stay by the court that has  
11 the other litigation, that many times that issue is  
12 being litigated by the same lawyer. And, you know,  
13 you see it in the front of the decision. You know,  
14 I wanted to be sure that I wasn't overlooking  
15 anything, and I went into the dockets for all these  
16 cases, and I saw who the lawyers were, and I saw --  
17 and they stayed in the case.

18 So, you know, it -- certainly I acknowledge,  
19 Mr. Gershengorn, maybe you guys are the only  
20 lawyers who seem to have found this issue. But the  
21 one case you cited doesn't seem to me to stand  
22 directly for the proposition, and I can find no  
23 other case support. And I find a slew of cases  
24 dealing with the issue that I think we should be  
25 dealing with in which the same lawyer is

1 representing the bankrupt debtor and the individual  
2 defendants. One of them, which was one that I only  
3 saw today, is one that your firm had some  
4 involvement in, although not initially, and that's  
5 an FLSA case against Dunkin' Donuts and Baskin  
6 Robbins, FPSDA, LLC. I'm sure you're familiar with  
7 it. Eastern District of New York,  
8 Bankruptcy, 2012.

9 And there's an interesting decision, long  
10 decision, by the bankruptcy judge in 2012. And the  
11 cite is 2012 Westlaw 6681794, December 26th, 2012,  
12 ultimately declining to extend the stay to the  
13 individual defendants, and addressing, you know,  
14 questions of indemnification claims, are they  
15 administrative claims? Are they general unsecured  
16 claims? Is there -- you know, by virtue of a  
17 possible indemnification claim, does that  
18 essentially put the debtor and the individual  
19 defendants in such an identity of interests that it  
20 would be unfair for the case to proceed against the  
21 individual defendants if the company is the one  
22 that is ultimately going to be on the hook for any  
23 defendants? Anyway, it's a -- it's a very long and  
24 I think helpful decision that discusses other  
25 cases.



1           And, you know, in that case I went back to the  
2           docket sheet, and there was a letter January 2012  
3           by the firm of Ruskin, Moscou and Faltischek,  
4           representing -- and the case had been filed, no  
5           answers had been filed, and it was a letter from  
6           that firm indicating the firm is counsel to CDDC  
7           Acquisition Company, and some other companies,  
8           three of the defendants in the above-referenced  
9           action, you know, they filed for bankruptcy,  
10          letting the court know.

11          And then subsequent to that the -- one of the  
12          individual defendants who sought a stay was  
13          represented by an attorney with that same firm,  
14          and, Mr. Gershengorn, I think, you know, a year and  
15          a half later you came in and took over for that --  
16          that lawyer withdrew, and you represented the  
17          individual defendant. I recognize that the matter  
18          was stayed as to the company at that time, but at  
19          least you came into a case where the same lawyer  
20          seemed to be representing the company and the  
21          individual defendant. And, you know, I want to  
22          give you these cases, because I want you to look at  
23          them.

24          I mean, the same is true in -- I'm going to  
25          give you the cases. Texas -- no, I think it's --

1       Tenas, T-E-N-A-S, Tenas-Reynard against Palermo  
2       Taxi, and that's 2016 Lexus 42423, Southern  
3       District of New York, 2016. Good thoughtful  
4       decision.

5       Le Metier, L-E-M-E-T-I-E-R, Beauty Investment  
6       versus Metier Tribeca LLC, 2014 Lexus 136152,  
7       Southern District of New York, 2014.

8       Here's an odd one, Lightbody versus Girlie's  
9       Ambulette, and that's 2010 Lexus 88862, Eastern  
10      District of New York, 2010.

11      Stanford versus Phonex, 2009 Lexus 32405,  
12      Eastern District of Pennsylvania, 2009.

13      I certainly recognize that there is no  
14      discussion of that issue in those cases, but, you  
15      know, it's implicit in those cases that the  
16      attorneys didn't seem to think that there certainly  
17      was an actual conflict that mandated withdrawal,  
18      and there's no indication in any of the decisions,  
19      in any of the footnotes by any of the judges that  
20      they were troubled by this and thought there was  
21      a -- thought there was a conflict.

22      You know, I think that these cases, and, you  
23      know, there are a number of them, but I think these  
24      cases -- and the FLSA cases -- I found three FLSA  
25      cases. The one I cited has an expansive,

1 thoughtful, helpful decision. The other two cases  
2 go -- one goes one way and the other goes the other  
3 way. And it's -- it's a pretty perfunctory,  
4 cursory discussion, and I'll give you those -- one  
5 second. Those cases are Peterson versus Avantair,  
6 A-V-A-N-T-A-I-R, 2013 Westlaw 4506414, Middle  
7 District of Florida, 2013. That court did grant a  
8 quote, unquote discretionary stay.

9 And then the Lightbody versus Girlie's  
10 Ambulette. In that case the court concluded the  
11 individuals did not show that a stay was justified.

12 There are cases which deal with proceeding on  
13 sanctions motions against individual defendants  
14 rather than where the corporate defendant isn't in  
15 bankruptcy. One of them is Roberts versus  
16 Bennaceur, B-E-N-N-A-C-E-U-R, 2015 Westlaw,  
17 1471889, District of Connecticut. Same attorneys  
18 represented both parties.

19 So, I mean, to have a response to that, it  
20 seems -- it seems -- it seems striking, and it  
21 seems like, to me, as if your position is pretty  
22 significantly undercut by the absence of any  
23 authority out there.

24 MR. GERSHENGORN: I have two comments,  
25 your Honor. First, I don't know, having not looked

1 at those cases, if they any of those deal with  
2 issues where the debtor defendant is saying there  
3 is no indemnification, not what the indemnification  
4 looks like. And I think that's -- I think that's  
5 where we're at here, which is the individual  
6 defendants are saying they should be indemnified,  
7 that's their proof of claim. The debtor defendant  
8 is saying no, you're not indemnified. And so I'm  
9 not sure if that is or is not at play in any of  
10 those cases. But I think that that is one of the  
11 things that's underlying the conflict here.

12 Second, conflict aside, the individual  
13 defendants are not paying nor have they said they  
14 can pay, and we cited a number of cases to the  
15 Court in which it is permissible for counsel to  
16 withdraw.

17 THE COURT: Yeah, but I'm not interested  
18 in leaving these people with no counsel. They have  
19 an agreement with -- they had an engagement  
20 letters. Those engagement letters obligate their  
21 lawyers, who at the moment are you, to assist them  
22 in finding counsel. That's an affirmative  
23 obligation, and I haven't heard about what's been  
24 done to assist them in finding counsel. And I  
25 don't see that -- so, you know, I let you out

1       because they have no ability to pay you. Well, if  
2       they have no ability to pay you, presumably they  
3       have no ability to pay anybody else either, and  
4       they're the ones who are going to be left without  
5       counsel. And my reaction is, you know, is that --  
6       you know, is that fair to them? I don't -- it  
7       seems unfair to them. It seems to me that maybe  
8       the decision ought to be made to withdraw from  
9       representing the company as to which the  
10      proceedings are going to be stayed and continue  
11      representing the individual defendants. And I  
12      recognize that your ability to ultimately recover  
13      attorneys' fees there may be contingent. I'm not  
14      sure its a nullity, but it may be contingent. But  
15      there are a lot of cases in which a request to get  
16      out of representation because of nonpayment of fees  
17      isn't granted under extenuating circumstances.

18           You know, as to the -- as to the first issue,  
19      you know, I guess that -- that argument concerns  
20      me. I think if what you're saying is that the  
21      company believes that there is a divergence in  
22      their interests, they're not entitled to  
23      indemnification. I presume that they would have to  
24      say, I've read the documents. They're not entitled  
25      to indemnification because we, as a company, are

1 saying they didn't act in good faith, and they  
2 didn't act in what they believe to be the best  
3 interest of the corporation, because the  
4 indemnification provisions here are I think about  
5 as broad as one can get under the law. And they're  
6 pretty similar to every one of these cases I've  
7 read that have dealt with indemnification  
8 provisions and quote the language. And it seems to  
9 me that, first of all, the fact that you have  
10 litigated to date representing both of them and the  
11 company has paid their fees, to me, has to stand as  
12 a representation that as of last time you were in  
13 court before the bankruptcy was filed, there was --  
14 you didn't perceive any conflict.

15 So, the fact that they filed for bankruptcy has  
16 nothing to do with whether they're entitled to  
17 indemnification or not. I mean, just the simple  
18 fact that they filed for bankruptcy is nothing to  
19 do with whether they're entitled to  
20 indemnification. Indemnification by its terms  
21 turns on their good faith and whatever the language  
22 is, believe that their actions were taken in the  
23 interest of the corporation.

24 So, if they're facts that the company is saying  
25 well, gosh, we now know facts that makes us think

1       that they weren't acting in good faith or in our  
2       best interests, then those facts should have been  
3       brought to the Court whenever they arose, and they  
4       should not have been represented by same counsel.

5             But they weren't. I mean, what's been brought  
6       to the Court's attention is that the company filed  
7       for bankruptcy. And I don't know see how the fact  
8       that the company -- you know, and I don't think you  
9       can just come in here and say the company says  
10      they're not entitled to indemnification. On what  
11      grounds?

12            MR. GERSHENGORN: Well, I would tell the  
13      Court I am certainly not aware of any of those  
14      conversations in regards to conduct or behavior.  
15      And without delving into any attorney-client  
16      communications, the debtor defendant has certainly  
17      taken the position that the individual defendants  
18      are not indemnified. Presumably that's why the  
19      proof of claim was filed.

20            I think to the extent the Court would want  
21      anything additional on that, I would be more than  
22      happy to let the debtor defendants know that they  
23      should submit something.

24            THE COURT: Well, I guess, I'm not trying  
25      to be, you know, hostile or antagonistic to you.

1 This is a genuine ethical question. You are  
2 representing both of them. Don't you have an  
3 obligation once you come to court and tell me the  
4 company is telling me there's no basis for  
5 indemnification, you know, there's no secret here.  
6 The indemnification language is the same  
7 indemnification language you find all across the  
8 country in situations like this. It's good faith,  
9 and, you know, whatever the other prong is,  
10 reasonable belief.

11 You know, it would seem to me that you are  
12 representing the individual defendants right now.  
13 You hear from the company, you know, somebody from  
14 the company we don't have an obligation to  
15 indemnify. You ought to be saying what do you  
16 mean? I've been representing both entities, you  
17 know, the individual and the company. You know,  
18 what do you mean that they're not entitled to  
19 indemnification? You know, you've been  
20 representing both of them on the -- on the -- I  
21 assume with the belief that there were no divergent  
22 interests.

23 So, I am surprised to hear you come to court  
24 and say I don't know what that's based on. I think  
25 you have an obligation to find out what's that



1 based on.

2 MR. GERSHENGORN: And I -- I understand  
3 what the Court is saying. And I believe as counsel  
4 along with Miss Osipoff, therein lies the conflict.  
5 I can't speak anymore to those dialogues. I think  
6 that that's why we submitted the papers in camera  
7 and --

8 THE COURT: But your papers in camera  
9 didn't say anything other than they filed for  
10 bankruptcy, see TWI International, there's a  
11 conflict. You know, I'm not granting you relief on  
12 that basis. I don't think that that decision  
13 stands for that, and all these other cases counsel  
14 do exactly what I expected you to do here, which is  
15 to stay it on behalf of the individual defendants.  
16 I mean, you can argue with me about -- take the  
17 position that, you know, we're not getting paid, we  
18 should be allowed to get out. You know, that's an  
19 issue that I may or may not agree with you, and I  
20 may keep you in for awhile and let you out down the  
21 road. There are different ways to deal with that.

22 But, you know, your papers didn't say anything  
23 about this, you know, factual issue that I think  
24 you're saying makes this case different from all  
25 those other cases. You simply made an argument

1       that seems to me would apply to any other situation  
2       when, you know, you have this common scenario. And  
3       people aren't getting out under those typical  
4       situations.

5               MR. GERSHENGORN: Factually I understand  
6       what the Court is saying. I'm not sure -- I'd have  
7       to look at those cases. I understand what the  
8       Court's saying. When the issue did first arise,  
9       your Honor, the individual defendants asked us, and  
10      I believe we were on a telephone conversation, to  
11      request a stay pending the bankruptcy. That was  
12      not the road that we ended up going down. I don't  
13      recall sitting here exactly why we were not going  
14      to move the Court or follow down a road of a stay.  
15      But that was certainly something that we had  
16      initially raised.

17             We're not opposed to a stay. I mean, part of  
18      what we -- as representatives and still  
19      representatives of the individual defendants, I  
20      should state for the record again, they do want a  
21      stay. They don't want to proceed while the  
22      bankruptcy issue --

23             THE COURT: All right. So if I made you  
24      stay in the case, if I denied your motion -- and I  
25      am denying it on the basis of what's been submitted

1 to date. I don't find that the papers that have  
2 been submitted to date justify the relief that is  
3 sought. Okay. So, it seems to me that -- so you  
4 know, if you're in the case you're telling me that  
5 what you would do is make a motion for a stay on  
6 behalf of the individual defendants.

7 MR. GERSHENGORN: That would be correct,  
8 your Honor.

9 THE COURT: Okay. So I think what you --  
10 what you need to sort out now is to figure out  
11 whether you see any ethical constraints in the  
12 making a motion for a stay. And I don't want to  
13 suggest at all, you know, any prejudging the merits  
14 of that. I think there are a lot of very  
15 thoughtful decisions, and as I said, there are  
16 some -- some, you know, common threads that you can  
17 cull from the decisions. But sometimes you say oh,  
18 I think this judge saw it this way and a different  
19 judge reached a different conclusion on pretty  
20 similar considerations. So, it's not an easy  
21 determination. But, I think you need to -- you  
22 need to look at that.

23 Now, you know, I didn't anticipate that you  
24 were going to come in and tell me the company  
25 thinks they're not entitled to indemnification. I

1       assumed they made a claim for indemnification  
2       because that's the safe thing to do. And, you  
3       know, in bankruptcy, you're supposed to come in if  
4       you possibly have a claim. So, I did not read that  
5       as any reflection that the company thought that  
6       they were not entitled to indemnification. And as  
7       I said, I've assumed that the company to date has  
8       acted as if they're presumptively entitled to -- to  
9       indemnification.

10       And many -- most of these stay cases that I've  
11       cited deal with questions of indemnifications, and,  
12       you know, the black letter law is where there's  
13       automatic indemnification by contract, which is  
14       pretty hard to find automatic indemnification by  
15       contract, because I think by law you can't really  
16       have automatic indemnification. But that taxi  
17       case, which is the Palermo taxi case, that was a  
18       case where under the New York Vehicle and Traffic  
19       Law, if a taxi driver is found to have commit -- I  
20       don't know, engaged in negligent conduct, it's  
21       imputed to the taxi company. So there the judge  
22       said that is -- they're essentially identical in  
23       interests there. There is an identity in interest  
24       there by virtue of operation of law that the  
25       conduct of one is going to be imputed to the

1       conduct of the company.

2               So there's a lot of analysis of questions of  
3       indemnification, and I don't know, Mr. Gershengorn,  
4       about whether, you know, after you have further  
5       questions with whoever you need to have further  
6       conversations with, you know, you are going to  
7       believe that you are able, as so many other counsel  
8       in similar situations have done, make a motion for  
9       a stay, and at least represent them until we can  
10      get that determination issued, or whether because  
11      the stay issue may be bound up with indemnification  
12      issues.

13              But, you know, if the position is that there is  
14      a question of indemnification, I am likely to have  
15      a lot of questions about how is it that it's  
16      arising now. I don't understand that. I'm  
17      skeptical about what could have happened between  
18      the day before bankruptcy and the day after  
19      bankruptcy that all of a sudden created some real  
20      issue about indemnification that didn't exist the  
21      day before. I'm skeptical of that. I think it  
22      raises some real questions.

23              So, I am -- I'm not getting into the question  
24      of the sanctions motion. I will -- I know I will  
25      prejudge that in the sense of saying I think it is

1 very unlikely that I would agree with plaintiffs  
2 that the Court has jurisdiction to go forward  
3 against the company on a sanctions motion. To me  
4 that's pretty clear.

5 You've got some cases that you've cited. I  
6 think that there are cases that -- more cases have  
7 disavowed the reasoning of -- I think some of them  
8 the reasoning is a little different. It's a  
9 contempt motion. Your motion seeks sanctions, you  
10 know, of a different variety than -- contempt is a  
11 sanction that is coercive in nature and if the  
12 other party does what the other party is supposed  
13 to do, the contempt can be lifted. And that was  
14 the rational of at least some of these decisions.

15 But, you know, you're asking for striking the  
16 answer, I don't know, but really serious sanctions  
17 which could, in effect, I think result in liability  
18 by the defendants and judgment for the plaintiffs.

19 So, if you want to continue to go down that  
20 route, you can. But it's -- I have looked at those  
21 cases, and if I were to rule today, I would not  
22 rule in your favor on that. I'm not going forward  
23 with the sanctions against the company.

24 MS. LUKASIEWICZ: Your Honor, may I speak?

25 THE COURT: Yes.

1 MS. LUKASIEWICZ: I understand that you've  
2 looked at the cases. I mean, our respective -- at  
3 least all of the cases cited by defendants  
4 certainly were dealing with conduct that occurred  
5 after the bankruptcy, which I think the cases at  
6 least we cited occurred -- the conduct at question  
7 occurred prior to bankruptcy. I understand that  
8 you're saying it's a contempt issue. I think part  
9 of it also is though if it's dealing with contempt  
10 meaning something to kind of punish or deal with  
11 egregious behavior, which I think is what we've  
12 alleged in the sanctions motion, at least in part,  
13 it does make sense to move forward.

14 I think even aside from that though, as we said  
15 in our papers, we would think it makes sense to  
16 still certainly even without debtor defendant be  
17 able to move forward.

18 THE COURT: Yeah. No, I understand that's  
19 your position.

20 MS. LUKASIEWICZ: Sure.

21 THE COURT: And you're certainly free to  
22 argue anything that you want to --

23 MS. LUKASIEWICZ: Sure.

24 THE COURT: -- but I would say that, you  
25 know, my reaction when you brought it up on the

1 phone was that, you know, that was -- that was a  
2 big surprise to me. I've now read the cases. I  
3 don't think that they make a lot of sense to me.  
4 One of the cases acknowledges that the lead case  
5 was decided under a prior provision of the  
6 bankruptcy code and it's been revised since then.

7 So I'm not likely to find them persuasive. I  
8 say that because I think in terms of going forward  
9 in this case, you all ought to assume that I am  
10 setting aside the issue of proceeding on the  
11 sanctions motion against the company. My judgment  
12 is that is stayed, and I don't intend to proceed on  
13 that.

14 Proceeding against the individual defendants on  
15 a sanctions motion is, you know, fair game to --  
16 to -- for me to decide, as is just proceeding on  
17 discovery, and, you know, whatever else needs to  
18 happen against the individual defendants.

19 Is there any other questions or any other  
20 comments?

21 MS. LUKASIEWICZ: I guess I just had one  
22 comment. To the extent that under -- and I'm not  
23 obviously bankruptcy counsel, but I do understand  
24 obviously you can file in the bankruptcy  
25 proceedings relief of the stay for a specific



1        purpose. Would that be something that your  
2        court -- the Court would feel comfort in with  
3        moving forward with the debtor defendant if that  
4        was done to be able to deal with the sanctions  
5        motion in that respect?

6                THE COURT: Well, a couple things. You  
7        know, one of the questions is -- well, the  
8        individual defendants may seek to have the stay  
9        extended to them, and that issue arises, and I  
10       think the cases I've cited will illustrate that  
11       sometimes that motion is brought to the bankruptcy  
12       court, and it is a motion that is sometimes  
13       brought, as far as I can tell, by the bankrupt  
14       company, by the estate, saying that, you know, you  
15       should extend it to the individual defendants who  
16       aren't debtors, because by allowing it to go  
17       forward, it's going to have an adverse consequence  
18       to the bankrupt estate. And so it's not -- it's  
19       not an action brought by the individual defendants.  
20       It's brought by the bankrupt estate. But the  
21       argument is because we're the ones who are going to  
22       end up, you know, being left holding the bag, we're  
23       asking that the bankruptcy court extend the stay.

24                There are also cases in which the individual  
25       defendants in the -- in the litigation that is at

1 issue make the application, like, for example, Mr.  
2 Gershengorn can make the application here for a  
3 discretionary stay. As far as I can tell, the  
4 courts consider essentially the same -- the same  
5 factors in making a determination. But I think  
6 both the bankruptcy court and the district court  
7 have some authority to say it wouldn't be  
8 appropriate for the case to proceed or for certain  
9 portion of the case. I don't know that it has to  
10 be a stay as to everything.

11 And I think that you, as the plaintiffs, have  
12 the right as far as I know -- I didn't look at this  
13 issue, but this is my recollection of bankruptcy  
14 law, I think you can go to the bankruptcy court and  
15 ask for relief from the stay. I don't know how  
16 likely it is that you would get it, but I think  
17 that's -- so would I have comfort? I don't think  
18 it's a question of comfort. I would say that I --  
19 I feel as if any action against the company is  
20 stayed by virtue of the automatic bankruptcy stay,  
21 any action in this case, unless and until you  
22 obtain an order granting relief from that stay.  
23 So, the fact that you initiate proceedings isn't  
24 going to change that. You have to actually get the  
25 bankruptcy court to lift the stay as it pertains to

1       this litigation.

2               MS. LUKASIEWICZ: Yes, your Honor.

3               THE COURT: Okay. Anything else?

4               MR. GERSHENGORN: Nothing from the  
5 defendants, your Honor.

6               MS. LUKASIEWICZ: Is there anything  
7 further we need to do? We still have our sanctions  
8 motion pending obviously against not just every  
9 defendant.

10              THE COURT: What I think -- there's  
11 nothing to do on that because --

12              MS. LUKASIEWICZ: We just -- obviously, if  
13 we are able to move it forward and have a  
14 scheduling order, that would be the best. I mean,  
15 I think it's -- it's been pending a few months at  
16 this point. So I think even defense counsel  
17 represented in their reply that they don't deny  
18 that jurisdiction at least for them would be --

19              THE COURT: Okay. Let's do this. Today  
20 is the 19th, right, of October.

21              Mr. Gershengorn, if you were going to make a  
22 motion for stay on behalf of the individual  
23 defendants, you should do that by no later than  
24 November 9th. If no motion for a stay has been  
25 filed by November 9th, then what I would expect is

1       that I would issue probably a new scheduling order,  
2       and if for some reason, Mr. Gershengorn, you decide  
3       that, you know, you're not going to make a motion  
4       for a stay, you know, one of the things that I  
5       thought about is I encourage you, if there's any  
6       margin in doing this, to talking about, you know,  
7       what -- how can this case move forward in an  
8       efficient way without being bogged down and one  
9       motion after another motion after another motion  
10      that's ultimately going to be time intensive and  
11      expensive.

12           Last time I checked in, there was still a lot  
13      of discovery that needed to take place. Maybe you  
14      guys can come up with a plan for proceeding  
15      forward, this is what you're going to do over the  
16      next three months, and we may have an answer -- I  
17      mean, we may -- the company -- the bankruptcy  
18      proceedings may be over at the end of November. I  
19      don't know how realistic that is, but I don't do  
20      bankruptcy work, so I don't know. They move pretty  
21      quickly I think. And, you know, we can see what  
22      position we're in then. So it may be that, you  
23      know, if you -- if you all could agree there's some  
24      things that need to be done and we can, you know,  
25      and we can do them efficiently and without disputes

1 and conflicts. And, you know, we don't have to map  
2 out from here until the end of the case, because  
3 some things are going to happen and we're going --  
4 you know, we're going to know what the lay of the  
5 land looks like a little better six months from  
6 now. But let's agree to a plan for the first --  
7 I'm open to that. If not, then I'll have to make  
8 decisions on these issues as they arise. Okay?

9 MS. LUKASIEWICZ: Yes, your Honor.

10 THE COURT: Okay.

11 MR. GERSHENGORN: The only question I had,  
12 your Honor, is I understand the Court's ruling  
13 determination on the legal conflict issue as it's  
14 presently before the Court. In regards to the fact  
15 that the firm is not being paid currently for the  
16 individual defendants' representation, is that  
17 something that the Court would take into  
18 consideration down the road?

19 THE COURT: Okay. I am denying that  
20 application today. But I am -- I am doing so with  
21 the understanding that, you know, six months from  
22 now, or, you know, whenever you think that you are  
23 justified in coming back and saying our situation  
24 is really materially different than it was when you  
25 saw me in October, you're free to do that, and, you

1 know, I will take another look at it.

2 MR. GERSHENGORN: Thank you, your Honor.

3 THE COURT: Okay. All right. Anything  
4 else?

5 MS. LUKASIEWICZ: Nothing further.

6 MR. GERSHENGORN: Nothing further.

7 THE COURT: Miss Osipoff, you may have  
8 your chance yet.

9 MR. GERSHENGORN: Thank you, your Honor.

10 THE COURT: All right. Have a nice day.

11 \* \* \* \* \*

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

I certify that the foregoing is a  
correct transcription, to the best of my  
ability, from the electronic sound recording  
of the proceedings in this matter.

s/Michelle L. McLaughlin  
Michelle L. McLaughlin, RPR  
Court Reporter